

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 5, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP1252

Cir. Ct. No. 2002CF1477

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTHONY ELLIS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
RICHARD J. SANKOVITZ, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Anthony Ellis, *pro se*, appeals from orders denying his third WIS. STAT. § 974.06 (2009-10)¹ motion and a reconsideration

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

motion. We agree with the circuit court that the motion was procedurally barred, though for slightly different reasons. We affirm the orders.

¶2 In 2002, Ellis was sentenced to concurrent terms of fifteen years' initial confinement and ten years' extended supervision for convictions on armed robbery and attempted armed robbery. Appointed counsel pursued a no-merit appeal, to which Ellis responded. This court summarily affirmed the judgment of conviction. *See State v. Ellis*, No. 2003AP1680-CRNM, unpublished slip op. & order (WI App June 22, 2005).

¶3 Subsequently, Ellis filed at least three postconviction motions under WIS. STAT. § 974.06, including the current motion; one motion for sentence modification; a motion for a mental health evaluation; two direct appeals; and two petitions to this court for a writ of *habeas corpus* pursuant to *State v. Knight*, 168 Wis. 2d 509, 484 N.W.2d 540 (1992). When Ellis filed the § 974.06 motion underlying the current appeal, the circuit court denied it, noting that the issues “are all issues he could have raised in response to counsel’s no merit report.” Because Ellis offered no reason for failing to raise the issues in his response, the circuit court applied the procedural bar of *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 517 N.W.2d 157 (1994). Ellis moved for reconsideration, which the circuit court also denied.

¶4 The postconviction procedures of WIS. STAT. § 974.06 allow a defendant to attack his conviction after the time for appeal has expired. *Escalona*, 185 Wis. 2d at 176. All grounds for relief must be raised in the defendant’s original, supplemental, or amended motion or appeal. *State v. Allen*, 2010 WI 89, ¶25, 328 Wis. 2d 1, 786 N.W.2d 124; *Escalona*, 185 Wis. 2d at 181. Claims that could have been raised on direct appeal or by prior motion are barred from being

raised in a subsequent postconviction motion absent a sufficient reason for not raising the claims earlier. *See State v. Lo*, 2003 WI 107, ¶44, 264 Wis. 2d 1, 665 N.W.2d 756. This bar also applies when the prior appeal is a no-merit appeal. *Allen*, 328 Wis. 2d 1, ¶4.

¶5 If, however, the defendant can show that appellate counsel and the court of appeals have not followed the no-merit process—a process involving this court’s “‘full examination of all the proceedings’ to search for any ‘legal points arguable on their merits’”—the defendant may have provided a sufficient reason allowing him to make new WIS. STAT. § 974.06 claims and to avoid *Escalona*’s procedural bar. *Allen*, 328 Wis. 2d 1, ¶58 (citing *Anders v. California*, 386 U.S. 738, 744 (1967)), ¶64. Thus, in his current § 974.06 motion, Ellis attempted to overcome the *Escalona* procedural bar by claiming that there had been a failure of the no-merit process when appellate counsel and this court both failed to note or address issues related to ineffective assistance of trial counsel. We conclude, however, that this claim is insufficient for Ellis to avoid the procedural bar.

¶6 As the State points out, this is not Ellis’s first postconviction motion. The current motion does not explain why Ellis failed to challenge the no-merit procedures in the prior motions.² Without a sufficient reason to explain this failure, the procedural bar applies.

² It does appear that Ellis may have made the same or similar claims in his first WIS. STAT. § 974.06 motion but even so, the current motion does not explain why the current claims were not raised in the *second* § 974.06 motion. Moreover, to the extent issues in the current motion were already adjudicated following the first motion, they are barred from relitigation. *See State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991).

¶7 Moreover, Ellis’s claim that the no-merit process was faulty is premised on his belief that “appellate counsel did not provide effective assistance when he failed to address the ineffective assistance rendered by Ellis’s trial counsel within the no merit report.” (Capitalization omitted.) Ellis claimed trial counsel was ineffective because he “failed to learn the facts of Ellis’s case, failed to make reasonable investigations into the case, and therefore he failed to pursue possible defenses to the charges before he advised Ellis to make his guilty plea.”

¶8 However, these were claims that Ellis raised and this court expressly rejected in his second *Knight* petition. See *State ex rel. Ellis v. Dittman*, No. 2010AP1055-W, unpublished slip op. & order (WI App June 8, 2011). “A matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). We therefore affirm the circuit court, although based on slightly different rationale. See *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

By the Court.—Orders affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2011-12).

